(1)

Supreme Court, U.S.
FILED

No. 97-77 JUL 8 1997.

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ROBERT AYERS, JR., Warden, *Petitioner*,

v.

TROY ISAIAH MITCHELL, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General of California
GEORGE WILLIAMSON
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
WILLIAM T. HARTER
Supervising Deputy Attorney General
* ALENE M. GAMES
Deputy Attorney General
* Counsel of Record
300 South Spring St.
Los Angeles, CA 90013
Telephone: (213) 897-2369
Counsel for Petitioner

79PP

QUESTIONS PRESENTED

1. Does *United States v. Powell*, 469 U.S. 57 (1984), allow a reviewing court to reverse a murder conviction on grounds of insufficient evidence when the court refused to consider any evidence that Mitchell used a gun or drove the murder car because the jury failed to find the personal gun use and driving allegations to be true beyond a reasonable doubt?

2. Is the rule announced by the Ninth Circuit Court of Appeals in this habeas corpus case -- that in assessing the sufficiency of the evidence to support a murder conviction, the reviewing court could not consider evidence that Mitchell used a gun or drove the murder car because the jury found the personal gun use and driving allegations to be "not true" -- a "new" rule within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989)?

TABLE OF CONTENTS

	Page
OPINION BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	6
ARGUMENT	8
I. CERTIORARI SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT'S OPINION, AS TO THE EFFECT THAT "NOT TRUE" JURY FINDINGS HAVE ON THE CONVICTED COUNTS, HAS CREATED A CONFLICT AMONG THE CIRCUITS AND IS CONTRARY TO CLEARLY ESTABLISHED UNITED STATES SUPREME COURT PRECEDENT	8
II. THE NINTH CIRCUIT'S RULE THAT "NOT TRUE" JURY FINDINGS CONSTITUTE ULTIMATE FINDINGS OF FACT IS A "NEW" RULE WITHIN THE MEANING OF *TEAGUE V. LANE*	12
CONCLUSION	13

TABLE OF AUTHORITIES

	Page
Cases	
Dunn v. United States, 284 U.S. 390 (1932)	9-11
Jackson v. Virginia, 443 U.S. 307 (1979)	11
Mitchell v. Prunty, 107 F.3d 1337 (9th Cir. 1997)	9
O'Dell v. Netherland, No. 96-6867 97 U.S. LEXIS 3862 (U.S. June 19, 1997)	12
People v. Santamaria, 8 Cal. 4th 903, 884 P. 2d 81, 35 Cal. Rptr. 2d 624 (1994)	10
Prince v. Lockhart, 971 F.2d 118 (8th Cir. 1992)	9
Santamaria v. Horsley, 110 F.3d 1352 (9th Cir. 1997)	9
Teague v. Lane, 489 U.S. 288 (1989)	12
United States v. Acosta, 17 F.3d 538 (2d Cir. 1994)	8

TABLE OF AUTHORITIES, CONT'D

United States v. Alanis,
945 F.2d 1032 (8th Cir. 1991) 11

United States v. Clemmer,
918 F.2d 570, 573 (6th Cir. 1990) 10, 11

United States v. Lahey,
55 F.3d 1289 (7th Cir. 1995) 9

United States v. Long,
952 F.2d 1520 (8th Cir. 1991) 11

United States v. Messerlian,
832 F.2d 778 (3d Cir. 1987) 10

United States v. Parks,
68 F.3d 860 (5th Cir. 1995) 8

United States v. Powell,
469 U.S. 57 (1984) 9-11

United States v. Romeo,
114 F.3d 141 (9th Cir. 1997) 9

United States v. Seley,
975 F.3d 717 (9th Cir. 1992) 9

United States v. Watts,
117 S. Ct. 633 (1997) 8, 9

Robert Ayers, Jr., Warden, of the High Desert State Prison at Susanville, California, ("the Warden") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1/]

OPINION BELOW

The published opinion of the United States Court of Appeals for the Ninth Circuit, reversing the judgment of the district court, is reported as *Mitchell v. Prunty*, 107 F.3d 1337 (9th Cir. 1997). The order of the Ninth Circuit, denying rehearing and amending the opinion, is also reported as *Mitchell v. Prunty*, 107 F.3d 1337 (9th Cir. 1997), and is reproduced in Appendix A. The judgment of the United States District Court for the Central District of California, which denied the petition for writ of habeas corpus, is unreported. The judgment is reproduced and attached as Appendix B. The order of the California Supreme Court, denying Mitchell's petition for review is unpublished, and is reproduced in Appendix C. The opinion of the California Court of Appeal, Second Appellate District, Division Two is unpublished and is reproduced in Appendix D.

---

1. Mitchell was last held in custody by Robert Ayers, Jr., the Warden at the High Desert State Prison in Susanville, California. Thus, Robert Ayers, Jr. has replaced K.W. Prunty, the Warden of the California State Prison, Calipatria, Mitchell's former custodian, as the proper Petitioner in this case.

STATEMENT OF JURISDICTION

The opinion below was filed on February 26, 1997, and amended on April 10, 1997. The Ninth Circuit denied the Warden's petition for rehearing and suggestion for rehearing *en banc* on April 10, 1997.[2/]

Respondent Mitchell first invoked federal court jurisdiction in his habeas corpus case under 28 U.S.C. § 2254. The Warden now invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Section 2254 of title 28, United States Code, provides in pertinent part:

> "(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the

---

2. The Warden filed a second petition for rehearing and suggestion for rehearing *en banc* on April 24, 1997, which is still pending before the Ninth Circuit. On April 24, 1997, the Ninth Circuit issued the mandate and Mitchell was released from prison. This petition is filed within the earliest 90-day filing deadline possible, based on the Ninth Circuit's April 10, 1997, denial of the Warden's first petition for rehearing, in case the Ninth Circuit refuses to accept the Warden's second petition for rehearing at some later time. The Warden has also filed a concurrent request for this Court to recall and stay the mandate pending resolution of this case.

Constitution or laws or treaties of the United States."

STATEMENT OF THE CASE

In Mitchell's 1990 murder trial, witnesses testified that Mitchell was on a balcony with several other gunmen when they all opened fire on a rival gang member, standing in the street. Mitchell and his fellow gang members got into two cars, and Mitchell drove over the victim. Mitchell was convicted of second degree murder. The jury found two allegations to be "not true," that Mitchell personally used a gun, and that Mitchell was the

driver of the car which drove over the victim.[3] (RT 39-148, 182, 247-49, 380-83.)

Mitchell appealed his conviction and argued, inter alia, there was insufficient evidence he aided and abetted in the murder, and the court's instruction on aiding and abetting violated his due process rights. The California Court of Appeal affirmed Mitchell's conviction, stating that while the jury did not find beyond a reasonable doubt that Mitchell personally used a firearm or that he was the driver of the vehicle, it did not mean the jury completely discounted the witnesses' testimony as to Mitchell's personal involvement. "Credibility of the witnesses and the weight to be given their testimony is a determination for the jury." (App. D at 6.) Additionally,

---

3. The jury was instructed, inter alia:

"It is alleged in count one that the defendant Troy Mitchell personally used a firearm during the commission of the crime charged. If you find the defendant Troy Mitchell guilty of the crime charged or a lesser and included felony offense, you must determine whether the defendant Troy Mitchell personally used a firearm in the commission of such felony.

"The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true. You will include a special finding on that question in your verdict, using a form that will be supplied for that purpose.

"If you find the defendant Troy Mitchell guilty of murder in the first degree or second degree, you must also determine whether the defendant Troy Mitchell drove the vehicle which ran over the alleged victim named in the information, Jerry Knox.

"If you have a reasonable doubt as to whether or not the defendant Troy Mitchell was the driver, you will record on the verdict form provided for the special finding on the issue that it is not true.

"If you agree unanimously that defendant Troy Mitchell was the driver, you will record on the verdict form that it is true." (RT 526-28.)

the court found other evidence corroborated the witnesses' testimony and supported the murder verdict. (App. D at 6-7.) Mitchell's petition for review in the California Supreme Court was denied without citation to authority. (App. C.)

In September 1993, Mitchell filed a habeas petition with the United States District Court, raising the same issues. The District Court Judge adopted the recommendations of the Magistrate Judge and dismissed the petition with prejudice. The district court denied Mitchell's request for a certificate of probable cause. The Ninth Circuit granted Mitchell a certificate of probable cause, and appointed counsel.

In its published opinion, two members of the Ninth Circuit panel found that because the jury found the allegation that Mitchell personally used a gun to be "not true," and found the allegation that Mitchell drove the car over the victim to be "not true," Mitchell could be guilty of murder "- if at all - only as an aider and abetter." *Mitchell v. Prunty*, 107 F.3d 1337, 1340 (9th Cir. 1997). The panel further found that aside from the witnesses' testimony as to Mitchell's direct involvement, a theory rejected by the jury, there was no remaining evidence from which a rational jury could have found Mitchell aided and abetted in the murder. *Id.* at 1342. The dissent stated the circumstantial evidence and the logical inferences to be drawn therefrom were sufficient for a rational jury to find Mitchell intentionally aided and abetted in the murder. *Id.* at 1342, 1344.

The Warden filed a timely petition for rehearing and suggestion for rehearing en banc, arguing the seemingly inconsistent jury verdicts, which found Mitchell guilty of murder without personal involvement, did not allow the Ninth Circuit to disregard evidence Mitchell shot and drove over the victim in determining whether sufficient evidence supported the murder conviction. The Warden, citing *United States v. Powell*, 469 U.S. 57 (1984),

argued the court must review *all* the evidence independently of the jury's determination that some of the evidence was insufficient to prove other allegations.

The Ninth Circuit denied the petition for rehearing and suggestion for rehearing en banc, and issued an amended opinion. In the amended opinion, the majority held the jury's findings were dispositive to the questions presented to them, namely Mitchell did not personally use a gun and did not drive the car over the victim. *Mitchell v. Prunty*, 107 F.3d at 1139 n.2. Therefore, evidence contrary to the jury's "special findings" should not be considered in determining whether sufficient evidence supported Mitchell's conviction for second degree murder.

On April 24, 1997, the Warden filed a motion to recall and stay the mandate, and filed a second petition for rehearing and suggestion for rehearing en banc to address the new rule raised in the Ninth Circuit's amended opinion, namely the court's ruling that "not true" findings of criminal allegations constitute ultimate findings of fact. The Ninth Circuit denied the motion to recall and stay the mandate. (App. E.) Mitchell was released from prison. The second petition for rehearing is still pending.[4]

REASONS FOR GRANTING THE PETITION

This case requires the Court to decide what effect "not true" jury findings have on other counts against a defendant. In the instant case, twelve jurors found Mitchell guilty of murder. A unanimous three-justice panel of the California Court of Appeal, a federal magistrate judge, a federal district court judge, and one

---

4. *See supra* note 2.

judge on the Ninth Circuit panel found sufficient evidence to support Mitchell's murder conviction.

The published opinion in *Mitchell* creates a new precedent for reviewing the sufficiency of the evidence claims by removing from consideration any evidence underlying an unproven allegation. This new analysis has the potential to reverse countless convictions where allegations such as sentencing enhancements are alleged, but not proven beyond a reasonable doubt. The state is then without recourse because a defendant cannot be retried after a reviewing court fails to find sufficient evidence to support the conviction on another count.

The Court's authoritative guidance on this question is vital because, under the Rules of the Supreme Court of the United States, rule 10, the *Mitchell* opinion creates a conflict among the Courts of Appeals, as to the effect that a "not true" finding on an allegation has on a conviction on another count. Additionally, the holding in *Mitchell* conflicts with a decision of the California Supreme Court which held that when a defendant is found guilty of murder, but the weapon enhancement allegation is found to be "not true," the jury may have had a reasonable doubt that the defendant was involved as the direct perpetrator, or as an aider and abetter, but the jury had no such doubt that he was one or the other. *People v. Santamaria*, 8 Cal. 4th 903, 919, 884 P. 2d 81, 35 Cal. Rptr. 2d 624 (1994)

Further, the *Mitchell* opinion is contrary to this Court's holdings in *United States v. Watts*, 117 S. Ct. 633, 637 (1997), that an acquittal is not a finding of any fact, and is also contrary to the holding in *United States v. Powell*, 469 U.S. 57, 65 (1984), that the court must review all the evidence independently of the jury's determination that evidence on another count was insufficient when determining whether sufficient evidence supports the conviction.

ARGUMENT

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT'S OPINION, AS TO THE EFFECT THAT "NOT TRUE" JURY FINDINGS HAVE ON THE CONVICTED COUNTS, HAS CREATED A CONFLICT AMONG THE CIRCUITS AND IS CONTRARY TO CLEARLY ESTABLISHED UNITED STATES SUPREME COURT PRECEDENT

Traditionally,

> an acquittal is not a finding of any fact. An acquittal can only be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt. Without specific jury findings, no one can logically or realistically draw any factual findings inferences . . .

United States v. Watts, 117 S. Ct. at 637. With a not guilty verdict, the court only knows the verdict, not what the jury factually found. *United States v. Acosta*, 17 F.3d 538, 546 (2d Cir. 1994). In fact,

> a not guilty verdict on one count does not establish any facts favorable to the defense for the purpose of determining the sufficiency of the evidence on the counts of conviction.

United States v. Parks, 68 F.3d 860, 865 (5th Cir. 1995) (quoting *United States v. Nguyen*, 28 F.3d 477, 480 (5th Cir. 1994)). A judgment of acquittal is not admissible to rebut inferences drawn from other evidence because an acquittal does not prove innocence, only that the

prosecution failed to meet its burden of proof. *United States v. Lahey*, 55 F.3d 1289, 1296 (7th Cir. 1995); *Prince v. Lockhart*, 971 F.2d 118, 122 (8th Cir. 1992).[5] Even if an acquittal on one count is inconsistent with a guilty verdict on another count, a defendant is not entitled to a reversal of his conviction because an inconsistent verdict may be the result of "mistake, compromise, or lenity" on the part of the jury. *United States v. Powell*, 469 U.S. 57, 65 (1984); *Dunn v. United States*, 284 U.S. 390, 393-94 (1932).

In spite of seemingly established precedent, the Ninth Circuit in *Mitchell* held that the jury's "not true" findings were "special findings" which were "dispositive of the questions put to the jury," namely that Mitchell did not personally use a firearm, or personally drive the car over the victim. *Mitchell v. Prunty*, 107 F.3d at 1139 n.2.[6] The court's holding is contrary to the holdings in *United States v. Watts*, *United States v. Powell*, *United States v. Acosta*, *United States v. Parks*, *United States v. Nguyen*, *United States v. Lahey*, and *Prince v. Lockhart*.

Additionally, this Court and several other courts of appeals have held that courts should not attempt to probe or speculate on the thoughts or motives for a jury's verdict, nor should the courts attempt to rationalize or reconcile verdicts. *See United States v. Powell*, 469 U.S. at 66-67; *Dunn v. United States*, 284 U.S. at 393-94; *United*

---

5. Indeed, the very same evidence is admissible at a subsequent trial governed by a lower standard of proof. For instance, an acquittal in a murder trial would not bar the same evidence in a subsequent civil suit for wrongful death. *See also United States v. Watts*, 117 S. Ct. at 637.

6. The Ninth Circuit has found acquittal verdicts to be findings of ultimate facts in other cases, which involved collateral estoppel issues on retrial. *See United States v. Romeo*, 114 F.3d 141 (9th Cir. 1997); *Santamaria v. Horsley*, 110 F.3d 1352 (9th Cir. 1997); *United States v. Seley*, 975 F.3d 717 (9th Cir. 1992).

66-67; *Dunn v. United States*, 284 U.S. at 393-94; *United States v. Clemmer*, 918 F.2d 570, 573 (6th Cir. 1990); *United States v. Messerlian*, 832 F.2d 778, 797 (3d Cir. 1987). However, the Ninth Circuit in *Mitchell* attempted to reconcile the jury's verdicts of acquittal on the personal involvement allegations with the murder conviction and found that the only theory on which the jury could have reached consistent verdicts was that Mitchell, at most, aided and abetted in the murder. The Ninth Circuit's probing into the jury's verdicts was contrary to well established federal law, and caused the court to reach a conclusion which is expressly contrary to California law and the law in other federal circuits.

In *People v. Santamaria*, 8 Cal. 4th 903, 884 P. 2d 81, 35 Cal. Rptr. 2d 624 (1994), the California Supreme Court held that as long as each juror is convinced beyond a reasonable doubt that a defendant is guilty of murder, the jury need not decide unanimously by which theory he is guilty. *Id.* at 918. The court further held that if the jury has a reasonable doubt that the defendant specifically used a weapon, and still finds the defendant guilty of murder, the jury may have had a reasonable doubt that the defendant was involved as the direct perpetrator, or as an aider and abetter, but the jury had no such doubt that he was one or the other. *Id.* at 919.

The Ninth Circuit's opinion, in this case, needlessly speculated as to the jury's theory of guilt, and led the court to disregard California's law, and the evidence which supported the murder verdict. Once the Ninth Circuit mischaracterized the jury's "not true" findings as dispositive to those facts, its refusal to consider the evidence underlying the allegations involved was the equivalent of a refusal to consider the facts underlying counts in which a defendant has been acquitted in determining whether their was sufficient evidence to support guilty findings on other counts. This is clearly contrary to this Court's holding in *United States v. Powell*,

469 U.S. at 67. *Powell* held a review of the sufficiency of the evidence on one count "should be independent of the jury's determination that evidence on another count was insufficient." *See also United States v. Long*, 952 F.2d 1520, 1525 (8th Cir. 1991); *United States v. Alanis*, 945 F.2d 1032, 1035 (8th Cir. 1991). Indeed, "[e]ach count in an indictment is regarded as if it was a separate indictment." *Dunn v. United States*, 284 U.S. at 393; *see also United States v. Clemmer*, 918 F.2d at 573.

In sum, the Ninth Circuit's opinion on the effect that "not true" findings have on other convicted counts, conflicts with decisions by the Second, Fifth, Seventh, and Eighth Circuits, and has led to a widely disparate consideration of evidence, on review of claims of insufficient evidence. Additionally, the Ninth Circuit's interpretation of "not true" findings allows the court to disregard evidence of guilt, which is contrary to this Court's holding in *United States v. Powell*, 469 U.S. at 67, which states that sufficiency-of-evidence review involves an assessment of all the evidence to determine whether any rational trier of fact could find a defendant guilty beyond a reasonable doubt in accordance with *Jackson v Virginia*, 443 U.S. 307, 316, 319 (1979).

II.

THE NINTH CIRCUIT'S RULE THAT "NOT TRUE" JURY FINDINGS CONSTITUTE ULTIMATE FINDINGS OF FACT IS A "NEW" RULE WITHIN THE MEANING OF *TEAGUE V. LANE*

As discussed above, established California and federal precedent have held that an acquittal is not a finding of any fact, and the court must review all the evidence, even evidence underlying acquitted counts, in determining whether sufficient evidence supports a conviction. The Ninth Circuit has created a new rule, that "not true" jury findings constitute dispositive findings of fact that may rebut other evidence on appeal, and therefore, *Mitchell* cannot benefit from the court's holding. *See Teague v. Lane*, 489 U.S. 288, 305-310 (1989). The Ninth Circuit's new rule imposes a new obligation on the state which was not dictated in light of *United States v. Powell*, at the time Mitchell's conviction became final. *See O'Dell v. Netherland*, No. 96-6867 97 U.S. LEXIS 3862 at *10 (U.S. June 19, 1997). Neither of the two *Teague* exceptions apply.

Indeed, the prosecution would have been much more circumspect had existing precedent allowed a murder conviction to be reversed on the basis that allegations, commensurate with a defendant's culpability, yet not proven beyond a reasonable doubt would limit the evidence to be considered in support of the murder verdict. In the instant case, the Ninth Circuit's refusal to review all of the evidence was not dictated by *United States v. Powell* and *Jackson v. Virginia*, and therefore, created a new rule. Accordingly, Mitchell is not entitled to habeas relief from the Ninth Circuit's new rule.

CONCLUSION

Accordingly, for the foregoing reasons, the Warden respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit, in the case at bar.

Dated: July 7, 1997.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of California
GEORGE WILLIAMSON
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
WILLIAM T. HARTER
Supervising Deputy Attorney General

ALENE M. GAMES
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

AMG:lm:mol
LA96FA0047